APPEAL NO. 92004

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN. arts 8308-1.01 through 11.10 (Vernon Supp 1992). On December 5, 1991, a hearing was held in (city), Texas, with (hearing officer) presiding. She found claimant (respondent herein) had not received an offer of a *bona fide* position of employment and was entitled to certain benefits. Appellant asserts that a *bona fide* offer of employment was made.

DECISION

Finding that the decision and the findings on which it rests are not against the great weight and preponderance of the evidence, we affirm.

Respondent had worked for (employer) over 15 years when he strained his back while pulling a drain plug on (date of injury). He was taken to (Clinic) where (Dr. S) saw him. Dr. S referred him to (Dr. H) who, in a letter dated July 11, 1991, said he could return to light duty with no lifting over 10 pounds, and no repetitious bending; the date such limited work could begin was left blank. He notes respondent had a similar injury to his lower back in 1988 with similar symptoms. Although this report is dated July 11, 1991, respondent testified he did not receive it until August. It was this evaluation that apparently served as the basis for Dr. S, respondent's treating doctor at the time, to report on August 2 that respondent was released to light duty effective August 5, 1991. Respondent thereafter on August 6, 1991, sought the services of (Dr. Her), who had not released him to return to work as of the hearing date, December 5, 1991.

Respondent, upon receiving the clearance to light duty, called and came to employer's premises on August 5, 1991. He talked with the company nurse telling her that although he had a release to light duty he wanted to see another doctor because he was in pain. He also spoke with (Mr. Mc), the safety manager, by telephone. On August 6, 1991, respondent saw Dr. H, got the medical excuse from work, and took it to employer's nurse. Respondent said no offer of a position of light duty was ever made on 5 or 6 August. He did acknowledge receiving a written letter dated November 13, 1991. The body of that letter said:

> Along with your medical releases for light duty, you have been offered light duty at the plant. The first of these offers was given to you on (date). This letter will verify that our light (modified) duty remains in effect.
> Please contact the Personnel Office for further information on this matter.

The nurse said she told respondent that light duty was available for him and that he should speak to a department head, Mr. Y, and his supervisor about this. She also told him that some light duty work was performed in the safety and medical office; previously she had reminded respondent that light duty was available before he ever had the release to light duty. She had no access to schedules to offer employment. Respondent was said

not to be interested in returning to light duty.

Mr. Mc told respondent that light duty was available either in the safety office or his own area. He said respondent told him he could not do light duty. He said if respondent had been willing to work, employer would have contacted his physician to discuss what he would be doing. Restricted duty would be arranged either in his department or safety. Mr. Mc went on to mention to respondent certain filing that needed to be done. Mr. Mc said employer is, and has been, willing to put him back to work.

Article 8308-4.23(f) requires that an offer of a *bona fide* position, which the employee is reasonably capable of performing, must be made in order to adjust the amount of temporary income benefits. Tex. W.C. Comm'n TEX. ADMIN. CODE § 129.5(a) (rule 129.5(a)) provides five criteria that the "commission shall consider" in this area. The fourth of these is "the physical requirements and accommodations of the position compared to the employee's physical capabilities;". As a standard requiring that a comparison be made, each of the elements should first be evaluated. The "employee's physical capabilities" can be determined by the evaluation of the treating doctor (Dr. S) who triggered an offer, other doctors who evaluated the employee, and the employee's own opinion of his capability. (*See* Texas Workers' Compensation Commission Appeal No. 91023 (Docket No. HO-00017-91-CC-2) decided October 16, 1991.) The other prong of the comparison is the position -- its physical requirements and accommodations. The record does not describe a position offered that could then be compared to the "employee's physical capabilities." The rule requires definition of the position; if an employer wished to make more than one position available, each should be described consistent with rule 129.5(a). Finding of Fact 9 addressed the question of a position and said,

> "On August 5, 1991, (nurse) told CLAIMANT that light duty was available without telling CLAIMANT what he would be doing, how long he would be doing it or how much he would be paid."

This finding was supported by sufficient evidence of record. In addition, employer used a letter, dated November 11, 1991, to offer a position. Through the letter the employer could gain the presumption of a *bona fide* offer described in rule 129.5(b), but only if it contained information required of a written offer by that subsection. Clearly the November 11, 1991 letter did not contain sufficient information to warrant a presumption. As a result, Conclusion of Law 6 adequately interprets rule 129.5(b) that attaches a presumption to certain written offers when it says,

> "CLAIMANT'S employers letter, marked and admitted as CR EX#D herein, does not meet the criteria for a *bona fide*, written offer of employment as set forth in 28 TAC 129.5(b) and occurred after CLAIMANT'S doctor had determined that CLAIMANT was unable to return to work."

This conclusion is sufficiently supported by the letter in question. Reference to "claimant's doctor" therein was unnecessary and may be disregarded. Texas Indem. Ins. Co. v.

Staggs, 134 Tex 318, 134 S.W. 2d 1026 (1940). When no presumption attached to the letter, the written material merely adds to the evidence to be weighed to determine if the evidence of an offer of a *bona fide* position was clear and convincing. With neither evidence of a particular position being offered nor what physical requirements or accommodations it entailed, the hearing officer did not err in making Conclusion of Law 3:

"As provided by 28 TAC 129.5 and Texas Workers' Compensation Commission Appeals Decision NO. 91023, the CARRIER did not provide clear and convincing evidence that CLAIMANT'S employer made him a *bona fide* offer of employment within the restrictions of his light duty release."

That conclusion was sufficiently supported by the evidence. Correspondingly, the hearing officer did not err in making no finding that an offer of a *bona fide* position was made.

The hearing officer's Finding of Fact 10 was sufficiently supported by the evidence. However, it was not necessary to her decision and may be disregarded since the decision could be rendered on valid findings. Bittick v. Ward, 448 S.W. 2d 174 (Tex. Civ. App. Beaumont 1969, writ ref'd n.r.e.). Finding of Fact 10 read as follows:

"On August 6, 1991, CLAIMANT was seen by (Dr. AH), M.D., whose evaluation of CLAIMANT indicated he (CLAIMANT) was not yet able to return to work at all and under whose care CLAIMANT remains.

Finally appellant asserts that Conclusion of Law 5 was in error in placing significance on the fact that Dr. H was claimant's initial choice of doctors and Dr. S was not. Conclusion of Law 5 reads:

"CLAIMANT'S treatment by Dr.S did not constitute his initial choice of doctor, as provided in 28 TAC 126.7(f); but, rather, CLAIMANT'S initial choice of doctor was made on August 6, 1991, when he saw Dr. AH, who determined that CLAIMANT was not able to return to work."

While that conclusion was sufficiently supported by the evidence of record, it was not necessary to determine the initial choice of doctor since the only issue was "was an offer of a *bona fide* position made after release to light duty?" This conclusion may also be disregarded. Staggs and Bittick, *supra*.

The appellant urges that the hearing officer's decision was contrary to the spirit and intent of the 1989 Act and goes against the legitimate purposes of the workers' compensation law -- that being "to encourage workers to at least attempt to return to work and earn wages . . ." We can not share this view. The statute and implementing rules specify reasonable requirements for establishing offers of employment. These requirements are not intended to elevate form over substance but rather to define requirements that must be met in an attempt to avoid disputes. If there were no definitive guidelines, determining what must be done to effect an offer of employment would be fraught

with uncertainty. The rules promulgated by the commission attempt to remove that uncertainty and avoid disputes; but, to do so, the necessary steps must be taken. They were not in the case *sub judice*.

The decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust or wrong, International Ins. Co. v. Torres, 576 S.W. 2d 862 (Tex. App. Amarillo 1978, writ ref'd a.r.e.) and is affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge